STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 1, 2011
V	No. 293547 Kent Circuit Court
STEVEN LEE MONTEZ, Defendant-Appellant.	LC No. 09-000577-FC

Before: WILDER, P.J., and SERVITTO and SHAPIRO, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of one count of first-degree criminal sexual conduct (CSC I) involving a person under 13 years of age, MCL 750.520b(1)(a), one count of CSC I involving a related person between the ages of 13 and 16, MCL 750.520b(1)(b)(ii), and one count of second-degree criminal sexual conduct (CSC II) involving a related person between the ages of 13 and 16, MCL 750.520c(1)(b). Defendant was sentenced to concurrent terms of 17.5 to 50 years for CSC I and six to 15 years for CSC II. Defendant appeals as of right. We affirm defendant's convictions, but remand for resentencing. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Complainant, defendant's niece, testified that she performed fellatio on defendant in an upstairs room at the home of "Diane" at a time when she would have been under 13 years of age. She also testified that defendant had performed cunnilingus on her when she was between the ages of 13 and 16, and that defendant had put his hands and mouth on her breasts. Complainant's sister relayed that she had performed fellatio on defendant when she was ten to 12 years old. Complainant's cousin (also defendant's niece), who was 25 years old, testified that she had performed fellatio on defendant when she was 13 years old.

An investigator testified that, on a computer in defendant's home, she had discovered a pornographic video labeled "Young Sluts" that involved an adult woman who appeared to be about 12 years old, as well as photographs of defendant receiving fellatio from various adult women. These items were not introduced at trial but were described. Defendant argues that the videotape was admitted in violation of MRE 1002 and MRE 404(b), and that the description of the photographs violated MRE 404(b).

MRE 1002 provides:

> To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute.

Defendant did not argue that the original recording should have been admitted; he specifically stated that he did not want it admitted. Since he did not object below on the same grounds being asserted on appeal, review is for plain error affecting substantial rights. MRE 103(d); *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Here, admission of the video itself would presumably have been more prejudicial than the description of the video. There was no plain error in opting for the less prejudicial alternative.

MRE 404(b)(1) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

In *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), amended on other grounds 445 Mich 1205 (1994), citing and quoting *Huddleston v United States*, 485 US 681, 687, 691-692; 108 S Ct 1496; 99 L Ed 2d 771 (1988) (emphasis in original), our Supreme Court elaborated:

> [First,] [t]he evidence must be relevant to an issue other than propensity under Rule 404(b), to "protect against the introduction of extrinsic act evidence when that evidence is offered *solely* to prove character." . . . Stated otherwise, the prosecutor must offer the other acts evidence under something other than a character to conduct theory.
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> Second, . . . the evidence must be relevant under Rule 402, as enforced through Rule 104(b), to an issue or fact of consequence at trial. 2 Weinstein & Berger, Evidence, § 404[08], p 404-49.
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> Third, the trial judge should employ the balancing process under Rule 403. Other acts evidence is not admissible simply because it does not violate Rule 404(b). Rather, a "determination must be made whether the danger of undue prejudice [substantially] outweighs the probative value of the evidence in view of the availability of other means of proof and other facts appropriate for making decision of this kind under Rule 403." 28 USCA, p 196, advisory committee notes to FRE 404(b).

If, as here, the issue is preserved, the admission of other acts evidence is reviewed for a clear abuse of discretion. *People v Waclawski*, 286 Mich App 634, 670; 780 NW2d 321 (2009). Errors in the admission of evidence are nonconstitutional. *People v Whittaker*, 465 Mich 422, 426; 635 NW2d 687 (2001). Thus, any error would not be a ground for reversal unless it

affirmatively appears that it is more probable than not that the error was outcome determinative. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

We conclude that the trial court erred in admitting the videotape and the photographs of defendant. In *People v Sabin*, 463 Mich 43, 60-61; 614 NW2d 888 (2000), our Supreme Court noted that "[u]nlike the courts of other jurisdictions, we have never adopted the so-called 'lustful disposition' rule, which allows the use of other acts for propensity purposes in sex offense cases." With respect to the video, the prosecutor indicated he was trying to show that defendant was interested in sexual activity with young girls as evidence that he had acted on those impulses. In other words, the prosecutor was trying to show that defendant found young girls sexually interesting, and acted in conformity therewith. Therefore, the evidence was introduced to show that defendant had a lustful disposition with regard to young girls and that he acted accordingly. The video was therefore erroneously admitted.

Regarding the photographs, we conclude that pictures showing defendant engaged in fellatio with adult women would not be probative, or would be marginally probative at best, of complainant's claim that she performed fellatio on defendant while underage. That defendant engaged in presumably consensual adult oral sex does not establish that he would engage in similar sexual abuse of a child. Given this lack of any significant connection, any marginal relevance would be outweighed by the danger of unfair prejudice under MRE 403.

Nevertheless, we conclude that the erroneous admission of this evidence was harmless. Three of defendant's nieces each testified as to multiple incidents of sexual abuse. While the defense attempted to undermine their testimony by suggesting other reasons why each might be angry with the defendant, their testimony remained compelling and defendant failed to demonstrate that any of them, let alone all three, had a significant motive to falsely accuse the defendant. After reviewing the record, we cannot conclude that absent the admission of the photographs of the defendant with adult women or the admission of the pornographic video it would be more probable than not that a different outcome would have resulted.

Defendant next argues that the trial court erred in scoring Offense Variable (OV) 9 at 10 points. We agree.

This Court reviews a scoring decision to determine whether the sentencing court properly exercised its discretion and whether the evidence adequately supported a particular score. *People v Steele*, 283 Mich App 472, 490; 769 NW2d 256 (2009). However, to the extent the scoring decision involves the interpretation and application of the statutory sentencing guidelines, it is a legal question subject to de novo review. *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257 (2008). An error in the calculation of the sentencing guidelines range that increases the length of the defendant's sentence constitutes plain error affecting substantial rights. *People v Brown*, 265 Mich App 60, 66-67; 692 NW2d 717, rev'd on other grounds 474 Mich 876 (2005).

Offense Variable 9 is scored at ten points if "[t]here were 2 to 9 victims . . . ." MCL 777.39(1)(c); *People v Gullett*, 277 Mich App 214, 217; 744 NW2d 200 (2007). Each person placed in danger of injury is to be counted as a victim. MCL 777.39(2)(a). In *People v Sargent*, 481 Mich 346, 351; 750 NW2d 161 (2008), our Supreme Court held that OV 9 could not be scored at ten points where the defendant had sexually molested a second victim in a separate,

uncharged offense. The Court stated, "when scoring OV 9, only people placed in danger of injury or loss of life when the sentencing offense was committed (or, at the most, during the same criminal transaction) should be considered." *Id*. at 350. See also *People v McGraw*, 484 Mich 120, 135; 771 NW2d 655 (2009) ("a defendant's conduct after an offense is completed does not relate back to the sentencing offense for purposes of scoring offense variables unless a variable specifically instructs otherwise"). Cf. *People v Waclawski*, 286 Mich App 634 (OV 9 properly scored at ten points where there was some evidence others were present during the sexual assault); *People v Phelps*, ___ Mich App ___; ___ NW2d ___ (2010) (OV 9 was improperly scored at ten points where others were present during sexual assault but were not endangered).

Here, there was no evidence that anyone else was present and/or endangered during the sexual assaults for which defendant was convicted. The first CSC I conviction was for the act of fellatio when complainant was under 13 years of age. This occurred in an attic room after defendant had instructed others present to go downstairs so that he could talk to the victim. There is no indication that the others who went downstairs were in any danger. The evidence supports only a finding that the victim was endangered. The other CSC I conviction involved the act of cunnilingus. This was not the offense scored. However, MCL 777.21(2) provides that each offense be scored. The victim testified that this occurred while she and defendant were camping and once at a house in Grand Rapids. There is no evidence that anyone else was present on these occasions. Accordingly, OV 9 should have been scored at zero points.

Defendant's total score of 80 for the offense variables gave him an OV Level of V and resulted in a sentencing range of 126 to 210 months. If the OV score were reduced by ten points, defendant would have an OV level of IV. See MCL 777.62. This would result in a sentencing range of 108 to 180 months. *Id.* Since this alters the sentencing guidelines range, defendant is entitled to resentencing. See *People v Jackson*, 487 Mich 783, 794; ___ NW2d ___ (2010) (a defendant must be sentenced according to accurately scored guidelines and in reliance on accurate information).[1]

Finally, defendant argues that he received ineffective assistance of counsel. Review is limited to mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

> For a defendant to establish a claim that he was denied his state or federal constitutional right to the effective assistance of counsel, he must show that his attorney's representation fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). As for deficient

[1] Given this disposition, we need not address the ineffective assistance of counsel claim relative to this issue.

> performance, a defendant must overcome the strong presumption that his counsel's action constituted sound trial strategy under the circumstances. *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997). As for prejudice, a defendant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different . . . ." *Id*. at 167. [*People v Toma*, 462 Mich. 281, 302-303; 613 NW2d 694 (2000)].

"A sound trial strategy is one that is developed in concert with an investigation that is adequately supported by reasonable professional judgments." *People v Grant*, 470 Mich 477, 486; 684 NW2d 686 (2004). "This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999).

The bulk of defendant's ineffective assistance claims deal with matters extraneous to the record. He implies that there was something abnormal about his penis in arguing that counsel should have cross-examined complainant regarding her claim that defendant's penis was "normal." There is nothing in the record to suggest that defendant's penis had distinguishing characteristics. Defendant also asserts that complainant should have been cross-examined about having given false information about someone else that could have been damaging. Defendant does not identify the basis for this claim and there is no mention of it in the record. Defendant next suggests that counsel could have established that someone else took photographs of complainant's sister. There is nothing in the record to support this assertion. Defendant further asserts that unnamed witnesses could have established that he had not had a computer for about eight years. The purported testimony of such witnesses is not of record. Moreover, the record does not establish that defendant's former roommates would have given substantiating testimony. Since our review is restricted to the record, these allusions to other matters do not establish a claim of ineffective assistance.

Defendant also suggests that counsel failed to establish that complainant's sister was clothed in two photographs. However, the photographs were admitted into evidence. Accordingly, the jury could make its own assessment of this fact.

Defendant further argues that the nieces should have been cross-examined relative to their inconsistent descriptions of the attic area. However, further inquiry could have emphasized the consistencies of the testimony. Counsel could have made a tactical decision not to explore the minor inconsistencies, as it would have instead highlighted the consistencies. *Rockey*, 237 Mich App at 76-77.

Defendant next takes issue with the timing of an objection to testimony about how truthful people behave. Immediately after the subject statement, the court stated "counsel", counsel immediately objected, and the jury was advised to disregard the testimony. The witness again made a similar statement to which counsel immediately objected. The objections were timely.

Finally, defendant asserts that counsel should have anticipated that photographs of women performing fellatio on him would be offered and should have sought discovery of them. Counsel was afforded an opportunity to review the photographs before his cross-examination of the witness. Defendant does not indicate what counsel would have done differently if he had

contemplated the admission of the photographs before trial, or how the belatedness of the opportunity to review the photographs resulted in any prejudice. Accordingly, he has failed to demonstrate that he received the ineffective assistance of counsel.

We affirm defendant's convictions but remand for resentencing consistent with this opinion. We do not retain jurisdiction.

/s/ Kurtis T. Wilder
/s/ Deborah A. Servitto
/s/ Douglas B. Shapiro